Supreme Court, U.S.
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No. 94-1141

In the

Supreme Court of the United States

October Term, 1994

BP PERFORMANCE POLYMERS, INC.,

Petitioner,

v.

ETHYL CORPORATION; TRAVELERS INSURANCE COMPANY; LUDGATE INSURANCE CO., LTD.; COMPAGNIE EUROPEENE d'SSURANCES INDUSTRIELLES S.A.; ASSICURIAZIONI GENERALI, S.P.A.; UTICA MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Ethyl's response contains nothing that should dissuade this Court from granting BP's petition. Rather than address directly the arguments and substantial federal questions presented by BP, Ethyl has resorted to ignoring and mischaracterizing the factual record below and the legal merits of BP's petition. Ethyl misstates the record, for example, by claiming that BP stipulated to an amount of damages caused by BP. (Res. 4.) This is simply not true. The parties only stipulated that Ethyl had spent approximately $9.3 million to defend and resolve Ethyl's underlying lawsuit with General Mills. BP never stipulated that that amount was proximately caused by BP's conduct. Indeed, the jury found that Ethyl itself was seventy percent at fault for the damages Ethyl claimed. In addition to factual errors of this sort, at least three legal arguments made by Ethyl warrant this reply.

I. Ethyl's Response Does Not Reconcile the Conflict that Now Exists between the Eighth Circuit and Other Circuits.

In its petition, BP cited and described decisions in both the Tenth and First Circuits with which the Eighth Circuit is now in direct conflict. Except of course for the holdings, the cases cited are *identical* in all relevant respects to this case, especially the Tenth Circuit's decisions in *Jackson State Bank v. King*, 992 F.2d 256 (10th Cir. 1993), and *Zierke v. Agri-Systems*, 992 F.2d 276 (10th Cir. 1993). Ethyl argues that this case is distinguishable because here the Eighth Circuit could supposedly discern from the comparative-fault verdict form exactly how the

jury would have decided the case had it not been instructed to apply comparative-fault principles. Ethyl tries to establish this with an analysis that only quotes select portions of the district court's damages instructions and virtually ignores the language and interrelationship of the various interrogatories on the verdict form.

Nowhere in its response, for example, does Ethyl explain – nor could it – how the Eighth Circuit could fairly say that the jury would have awarded $9,367,000 to Ethyl under correct instructions when that dollar amount (the stipulated sum that Ethyl paid to resolve its underlying lawsuit with General Mills) was given by the jury as an answer to Question 4, which asked: "*Making no reduction for fault, if any, you may attribute to plaintiff Ethyl,* what are [Ethyl's] total damages?" (App. 15 (emphasis added).) The jury, after all, in Question 6, found that *seventy percent* of the fault for all damages was attributable to *Ethyl,* not BP. These factual findings are simply irreconcilable with the Eighth Circuit's disposition of this case, and no court can fairly discern from the verdict form employed the amount of damages, if any, that the jury would have awarded to Ethyl if the jury had not been instructed under the comparative-fault principles of the Iowa Act.

Ethyl also ignores the fact that the jury knew what the effect of its answers would be on the district court's judgment. The jury was specifically instructed that if it found that Ethyl's "fault was more than 50% of the total fault, [Ethyl] cannot recover damages." (App. 11.) Because the jury found Ethyl seventy percent at fault, no court can reasonably assume that the jury would find in Ethyl's favor in any amount if it had received different

legal instructions. This is precisely the problem understood by the Tenth Circuit when it held that cases like this must be remanded for a new trial: " '[I]t would be manifestly unjust to assume in any way what the jury would have done had it been correctly instructed *and not misled regarding the effect on the judgment of its answers to the special interrogatories.*' " *Jackson State Bank*, 992 F.2d at 258 (emphasis added) (quoting *Phillips v. Duro-Last Roofing, Inc.*, 973 F.2d 869, 871 (10th Cir. 1992).).

II. BP's Petition Raises Questions of Federal Law and Appellate Procedure, Not State Law.

The Eighth Circuit's disposition of this case raises purely federal questions; no state law question of any sort is involved. Ethyl tries to convince this Court that the conflict that now exists between the federal courts of appeals is not on a point of federal law. Ethyl says: "the issue in dispute is the applicability of [the Iowa Act] to a purely commercial breach of warranty case, a strictly state law issue." (Res. 9; *see also* Res. 7 (same mischaracterization of BP's petition).) The Eighth Circuit's prediction on that state-law issue, however, was merely the predicate for its ultimate error in summarily disposing of this case in favor of Ethyl. Nowhere in BP's petition is any state-law question presented as an issue for this Court.

III. BP's Statement In a Pre-Trial Brief and the Fact that BP Proposed the Verdict Form that Was Used Are Irrelevant.

Ethyl sidesteps the importance of the federal constitutional issues raised by the Eighth Circuit's disposition of this case and argues, instead, that BP can have no constitutional objection or other complaint because BP proposed that a comparative-fault verdict form be used by the district court. Ethyl, as Justice Holmes would say, is shoveling smoke.

When BP submitted its proposed verdict form to the district court, the district court had already ruled that the Iowa Act applied to Ethyl's claims. In the light of that ruling, the proposed verdict form was not erroneous or prejudicial to any party. It simply followed the law as established by the district court. BP could not have submitted any other verdict form consistent with the district court's ruling. Only on appeal was the district court's ruling on the applicability of the Iowa Act determined to be wrong, and BP made it very clear in its brief to the Eighth Circuit that if the appellate court *did* reverse the district court on this point of law, a new trial was absolutely required. *See, e.g., Saunders v. State of Rhode Island*, 731 F.2d 81, 85 (1st Cir. 1984) (under very similar circumstances the First Circuit noted that the failure to object to the jury's charge was not fatal because "the basis for objection [to the jury's charge] only became known long after the charge was given").

Ethyl also tries to stretch and twist to its advantage one sentence written in a footnote in a pre-trial brief. This footnote said that the district court could use a verdict

form at trial to "prevent or protect against *the possibility* that comparative fault will be later overturned on appeal." This footnote was written long before any actual jury instructions or verdict forms were proposed to the district court by either side. Ethyl, however, would have this Court believe that by this footnote – and by the fact that BP submitted a proposed verdict form – BP has effectively waived all of its constitutional rights, including its right to due process and its Seventh-Amendment right to have no facts tried by the jury re-examined by any court. BP has waived none of these constitutional rights.

CONCLUSION

For the reasons stated in this reply and BP's petition, the petition for certiorari should be granted.

Respectfully submitted,

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